

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs June 3, 2008, at Jackson

EDDIE W. PHILLIPS, JR., v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
Nos. 2005-C-1730 and 2005-C-2590 Cheryl Blackburn, Judge

No. M2007-01920-CCA-R3-PC - Filed October 9, 2008

The petitioner, Eddie W. Phillips, Jr., appeals as of right the Davidson County Criminal Court's denial of his petition for post-conviction relief challenging the voluntariness of his guilty pleas. On appeal, the petitioner contends that the trial court erred in finding that he had not proven by clear and convincing evidence that his guilty pleas were involuntarily entered and that trial counsel committed ineffective assistance of counsel rendering his guilty pleas involuntary. Following our review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.

D. KELLY THOMAS, JR., J., delivered the opinion of the court, in which JOSEPH M. TIPTON, P.J., and ALAN E. GLENN, J, joined.

Ryan C. Caldwell, Nashville, Tennessee, attorney for appellant, Eddie W. Phillips, Jr.

Robert E. Cooper, Jr., Attorney General & Reporter; Clarence E. Lutz, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Bret Thomas Gunn, Assistant District Attorney General, Nashville, Tennessee, attorneys for appellee, State of Tennessee.

OPINION

In case number 2005-C-1730, the petitioner was indicted for possession of .5 grams or more of cocaine with the intent to sell or deliver and possession of 26 grams or more of cocaine with the intent to sell or deliver. In case number 2005-C-2590, the petitioner was indicted for possession of 26 grams or more of cocaine with the intent to sell or deliver, possession of drug paraphernalia, felonious possession of a weapon, aggravated burglary, and theft of property valued at over ten thousand dollars. On March 6, 2006, the petitioner entered guilty pleas to both counts of case number 2005-C-1730 and to the aggravated burglary and weapon possession counts of case number

2005-C-2590 in exchange for the dismissal of all remaining counts.¹ The record further reflects that the petitioner agreed to sentences of twenty years for each drug conviction, ten years for the aggravated burglary conviction, and one year for the weapon possession count.² The plea agreement also reflects that the petitioner was to serve the sentences as a Range III, persistent offender with a release eligibility percentage of forty-five percent. All sentences were ordered to be served consecutively, with the exception of the weapon possession count, for a total effective sentence of fifty years as a Range III, persistent offender.

On April 28, 2006, the petitioner filed a timely petition for post-conviction relief alleging that his guilty pleas were involuntarily and unknowingly entered due to trial counsel's deficient performance in advising him that he would be released within five years under the terms of his plea agreement due to prison overcrowding. Following the appointment of counsel and a full evidentiary hearing, the trial court denied relief.

The petitioner testified at the evidentiary hearing that he met with retained trial counsel only once or twice for ten minutes each time prior to entering the guilty pleas. He acknowledged that had he gone to trial on all counts of the indictments, he was facing "over a hundred years potentially." He related that trial counsel advised him to take the offer of fifty years rather than going to trial and told him that he "would be out in five years . . . [because he] would go up for [the] safety valve." The petitioner explained that counsel did some computing on a sheet of paper and assured him he would be released on the "safety valve" because, as he claimed trial counsel opined, "[he] ain't never been in a whole lot of trouble." Once incarcerated, the petitioner learned that his actual release eligibility date would not occur until 2028. The petitioner stated that had he known he would not be released in five years, he would have insisted on going to trial. On cross-examination, the petitioner acknowledged that he had five prior Class B felony cocaine convictions at the time of the guilty pleas, in addition to several automobile burglary convictions, and that he was facing sentencing as a habitual drug offender because of his history of criminal convictions. He denied that trial counsel mentioned the safety valve provision as a circumstance occurring only when there is an issue with overcrowding and stated that trial counsel presented the five years release information as an absolute certainty. However, he did acknowledge that the trial court explained that he would be eligible for release after the service of forty-five percent of his sentence.

Trial counsel testified that he has been practicing since 1982 and that the bulk of his practice was criminal defense. He recalled writing out release eligibility information for the petitioner and explaining how sentence reduction credits and other matters operate to affect a release date. He also recalled explaining the safety valve as "a long shot" that only occurred in "[e]xtraordinary circumstances because of prison overcrowding." Trial counsel also opined that "apparently that must have been the only thing [the petitioner] heard was the five years." The paper upon which trial

¹ The dismissal of counts contemplated by the plea agreement also included those of an unrelated indictment, case number 2005-D-3235, and "any other cases known to the State" at the time of the plea agreement.

² The record reflects that the petitioner was brought back into court subsequent to the March 6, 2006, guilty plea to enter the guilty plea to the weapon possession charge in order to avoid prosecution in federal court.

counsel made his calculations was admitted at the evidentiary hearing and shows a calculation of the forty-five percent release eligibility date indicating a sentence of twenty-two and one-half years, another calculation for sentence reduction credits indicating a minimum service of fifteen years, and the ten percent safety valve date. He recalled that the petitioner had been previously convicted of five Class B cocaine offenses and that he was facing another four Class B cocaine offenses when he decided to enter the guilty pleas. When asked if trial counsel advised the petitioner that the safety valve was a certainty, trial counsel responded, “No. He knows better than that.” Trial counsel stated that he discussed the same aspects of the plea with the petitioner’s mother over the telephone. Trial counsel further recalled that the petitioner came back to court to plead guilty to the weapon possession count in order to avoid a potential fifteen year consecutive sentence in federal court.

Patricia Gail McCord, the petitioner’s mother, testified that trial counsel telephoned her on the day of the guilty plea and told her that the petitioner had agreed to a fifty year sentence. She also recalled that trial counsel told her that the petitioner would be eligible for parole in five years. On cross-examination, she admitted that trial counsel had referred to the forty-five percent release eligibility during their discussion. She also admitted that trial counsel did not tell her that the petitioner would be “out” in five years but stated that the earliest possible parole eligibility would be in five years.

ANALYSIS

The burden in a post-conviction proceeding is on the petitioner to prove his grounds for relief by clear and convincing evidence. Tenn. Code Ann. § 40-30-110(f). On appeal, we are bound by the trial court’s findings of fact unless we conclude that the evidence in the record preponderates against those findings. Fields v. State, 40 S.W.3d 450, 456 (Tenn. 2001). Because they relate to mixed questions of law and fact, we review the trial court’s conclusions as to whether counsel’s performance was deficient and whether that deficiency was prejudicial under a de novo standard with no presumption of correctness. Id. at 457.

Under the Sixth Amendment to the United States Constitution, when a claim of ineffective assistance of counsel is made, the burden is on the petitioner to show (1) that counsel’s performance was deficient and (2) that the deficiency was prejudicial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see Lockhart v. Fretwell, 506 U.S. 364, 368-372, 113 S. Ct. 838, 842-44 (1993). In other words, a showing that counsel’s performance falls below a reasonable standard is not enough; rather, the petitioner must also show that but for the substandard performance, “the result of the proceeding would have been different.” Strickland, 466 U.S. at 694, 104 S. Ct. 2068. The Strickland standard has been applied to the right to counsel under Article I, Section 9 of the Tennessee Constitution. State v. Melson, 772 S.W.2d 417, 419 n.2 (Tenn. 1989).

In the context of a guilty plea as in this case, the effective assistance of counsel is relevant only to the extent that it affects the voluntariness of the plea. Therefore, to satisfy the second prong of Strickland, the petitioner must show that “there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart,

474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); see also Walton v. State, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997).

Following the evidentiary hearing, the trial court took the petition for post-conviction relief under advisement and subsequently entered a written order denying the petition based upon its finding that the petitioner's claim of involuntariness of his plea was without merit. The trial court found credible trial counsel's testimony regarding his explanation of release eligibility calculations to the petitioner. The trial court further found that the petitioner "was aware of the plea process and its ramifications and that he knowingly and voluntarily entered his guilty plea."

We conclude that the evidence does not preponderate against the trial court's findings regarding the voluntariness of the plea. During the guilty plea hearing, the trial court discussed in detailed fashion the possible sentences faced by the petitioner if he elected to proceed to trial and the aspects of the sentences he was agreeing to with the entry of the guilty plea. With each inquiry of the trial court, the petitioner indicated that he fully understood the guilty plea process and the benefit he was receiving by entering into the plea agreement; included in the petitioner's understanding was his acknowledgement of the forty-five percent release eligibility date.

We also note that, although the record reflects that the petitioner had not yet served a sentence in the custody of the Department of Correction at the time of his guilty plea, the petitioner was not new to the criminal justice system – to the extent that, as noted by the trial court at the guilty plea submission hearing, the petitioner was facing potential sentencing as a habitual drug offender. All of the guilty plea submission pleadings, as well as the computation note made an exhibit to trial counsel's testimony, reflect a release eligibility of forty-five percent. Trial counsel testified in detail regarding his explanation of release eligibility to the petitioner. Therefore, we further conclude that the evidence does not preponderate against the trial court's finding regarding the credibility of trial counsel's testimony regarding his explanation of release eligibility as it relates to the effective assistance of counsel and the voluntariness of the guilty pleas.

CONCLUSION

In summary, we agree with the trial court that the petitioner has failed to prove his post-conviction allegations by clear and convincing evidence. Therefore, we conclude that the judgment of the trial court is affirmed.

D. KELLY THOMAS, JR., JUDGE